with state law makes compliance with federal law impossible, but also when application of a state-law standard would upset a policy balance struck by federal law. *Hines*, 312 U.S. at 67 (preemption triggered when state law poses an obstacle to accomplishment of federal purposes, whether the "obstacle" is termed "conflicting; contrary to; . . . repugnance; difference; irreconcilability; inconsistency; violation; curtailment; [or] interference").

Heedless of these principles, the Fourth Circuit countenanced the application of state law to determine whether wireless telephones that satisfy the federal RF emissions standard nevertheless can be deemed "unsafe," even though state-law RF emissions "standards" crafted by state juries are certain to upset the delicate balance of interests reflected in the federal RF regulation. As the Petition points out, allowing juries to reach their own judgments about the safe operation of wireless telephones, guided only by the general principles of state products liability law, will inevitably disrupt the FCC's comprehensive regulatory scheme. Pet. 19-22, 23-24.[4] From the outset of its regulation of wireless service, the FCC has made clear that its design and operational standards must be uniform and cannot be effective in the face of conflicting or additional state directives. Pet. 7-8. It is also clear that the federal RF regulations balance competing national

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[4] The panel majority recognized as much when it noted, without disagreement, the district court's conclusion that allowing state-law claims like Respondents' to proceed would "stand as an obstacle to 'Congress' objectives of achieving national uniformity in wireless telecommunications services and striking a balance between the proliferation of wireless services and the need to protect the public from any harmful effects of RF exposure.'" Pet. App. 41a (quoting *In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 248 F. Supp. 2d 452, 463 (D. Md. 2003)). Rather than dispute the district court's conclusion, the Fourth Circuit pointed to the absence of statutory "evidence of such an objective" on the part of Congress to achieve exclusive, uniform national regulation of RF emissions. *Id.* at 42a.

priorities in a way that any state additions or subtractions from that regulatory equation will necessarily conflict with federal law. Indeed, as the dissenting judge noted below, the *very purpose* of these lawsuits is to tip that balance in one direction, contrary to the policy decisions embodied in the federal RF rules themselves. App. 46a-47a (Kiser, J., dissenting).

The Fourth Circuit simply ignored these self-evident conflicts with the federal regulatory regime (and its reasoning is equally applicable to conflict of the "impossibility" sort). The panel majority considered only whether Congress, not the agency itself, had evidenced a specific intent that federal law supply the exclusive standard for measuring safe RF emissions from wireless handsets.

The lower court's conclusion that state law is not preempted in the absence of evidence of congressional intent to preempt contains two fundamental deviations from this Court's precedents: *first*, that the absence of an express statement of preemptive intent in the statutory delegation of authority to an agency suggests that any regulation promulgated pursuant to that delegation cannot preempt state common-law claims, and *second*, that a regulation lacks independent preemptive force.

a. The Fourth Circuit acknowledged the three distinct theories under which federal law can preempt state law (Pet. App. 34a), but improperly conflated express and implied preemption when it required an *expression* of preemptive intent in order to find that state law was *impliedly* preempted. As a matter of both common sense and legal theory, the standard for determining whether preemption should be *inferred* cannot be whether it is *expressly stated*. "[C]onflict preemption is different [than express preemption] in that it turns on the identification of 'actual conflict,' and not on an express statement of pre-emptive intent." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000) (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990)). Nor does a

finding of conflict preemption turn on some quantum of independent "evidence" of congressional intent to preempt, short of an express statutory declaration.

This Court, condemning the "narrow focus on Congress' intent to supersede state law," has emphatically rejected the Fourth Circuit's "express statement" requirement for agency conflict preemption: "A pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Fid. Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 154 (1982).[5] Agency preemption arises not from a declaration of congressional intent, but directly from the constitutional primacy of federal law. *Geier*, 529 U.S. at 873. Since a federal regulation is superior to state law, that inferior law is preempted if it stands as an obstacle to accomplishing the purposes of the properly-authorized federal regulation; it need not also affirmatively conflict with the authorizing statute. Moreover, Congress is well aware of the primacy of federal regulation over state law, so it obviously understands that a federal regulation overrides state law in the event of a conflict. It would therefore merely be an empty formalism to require that Congress affirmatively state this truism when it delegates rule-making authority to an agency, or to require Congress to

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[5] Similarly, the agency itself need not declare its intent that a regulation operate preemptively in order to trigger conflict preemption. Just as Congress is not obligated to announce its intent that a statute preempt state law, a regulation need not "address pre-emption explicitly." *Geier*, 529 U.S. at 884. "Indeed, one can assume that Congress *or an agency* ordinarily would not intend to permit a significant conflict." *Id.* at 885 (emphasis added). That assumption is appropriate but not strictly necessary in this case, because the FCC repeatedly has announced its intent that its wireless telephony regulations apply uniformly and to the exclusion of state law. *See* Pet. 7-8, 19 (quoting, *inter alia*, *In re An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz*, 89 FCC 2d 58, 95 ¶ 81 (1982) ("It is imperative that no additional requirements be imposed by the states which could conflict with our standards and frustrate the federal scheme for the provision of nationwide cellular service.")).

particularize this truism with respect to every specific area where a conflict with federal regulations could arise.

b. Implicit in the Fourth's Circuit's conflict preemption analysis is a second and related analytical error: the assumption that a federal regulation cannot be considered, independent of the statute pursuant to which it was promulgated, to determine whether conflict preemption applies. In the Fourth Circuit, it is no longer true that "[f]ederal regulations have no less preemptive effect than federal statutes." *Fid. Fed. Sav. & Loan*, 458 U.S. at 153. According to *Pinney*, the principles of conflict preemption apply differently – or more strictly – when the federal law at issue takes the form of a regulation rather than a statute. Under the lower court's analysis, even a stark "impossibility" conflict between the operation of a regulation and the application of state tort law is insufficient to trigger conflict preemption unless *Congress itself* has preempted state law.

But this Court has declared repeatedly that the conflict preemption analysis does not vary when the federal law at issue is a regulation rather than a statute. The Supremacy Clause "encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." *City of New York v. Fed. Commc'ns. Comm'n*, 486 U.S. 57, 63 (1988). A federal regulation has no less preemptive force than a federal statute; both are, equally for preemption purposes, the "'supreme Law of the Land.'" *Id.* (quoting U.S. Const. art VI, cl. 2). When "state law could impose legal duties that would conflict directly with federal regulatory mandates," state law must give way to the primacy of the federal *regulation* no less than it would if the conflict arose from a federal *statute*. *Geier*, 529 U.S. at 871. It follows that "[p]re-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *La. Pub. Serv. Comm'n v. Federal Commc'ns. Comm'n*, 476 U.S. 355,

369 (1986) (citing, *inter alia*, *Fid. Fed. Sav. & Loan*, 458 U.S. 141).

Nor does a regulation's preemptive force turn on a congressional declaration of intent to preempt. Even absent an express delegation of preemptive authority, "[t]he statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York*, 486 U.S. at 64; *see also Fid. Fed. Sav. & Loan*, 458 U.S. at 153-54. Put another way, the principles of conflict preemption apply without variation when a regulation rather than a statute is at issue.

When an agency promulgates a regulation with uniform nationwide application, that regulation is entitled to the same deference afforded to statutes that, either by their express terms or in their operation, preempt conflicting state law. After *Pinney*, that principle holds true in every state other than those within the Fourth Circuit.

3. Settled principles of conflict preemption foreclose the "express statement" requirement imposed by the court below with good reason: It is simply not possible for Congress to foresee whether an agency, in the exercise of its expertise and judgment, eventually will determine that a regulation ought to operate uniformly nationwide to the exclusion of state law. Nor is it possible for Congress to predict all the myriad ways that state law might conflict with federal regulations yet to be promulgated. Congress confers the task of considering, formulating, and implementing regulations upon an agency in broad terms precisely because the agency can bring to bear technical or scientific expertise, unique knowledge, and relevant experience that Congress lacks. *See, e.g., Chevron U.S.A., Inc. v. Nat'l Res. Defense Council, Inc.*, 467 U.S. 837 (1984). The legislature expects and intends that an agency, given a broad mandate to regulate in the public interest, will fill via regulation "gaps" in the general statutory framework. *Id.* at 843-44. Among the gaps

frequently left to the agency to consider and, where appropriate, to address in the exercise of its delegated authority is the question whether state law can and should be permitted to apply concurrently with the federal regulation. Such "gap-filling" is particularly important, and necessary, where rapid technological change requires new and updated implementation of Congress' goals to deal with unforeseen developments. Requiring Congress to predict in advance whether a regulation, yet to be created, should operate preemptively impermissibly interferes with both the legislative and administrative function.

Just as the task of balancing relevant interests and objectives is left to an agency in the discharge of its statutorily delegated authority, the determination whether and when to preempt state law in favor of a uniform federal rule should be made by the agency in the exercise of its judgment. The agency is perfectly free to conclude – even absent an express pronouncement of preemptive intent by Congress – that its standard should have uniform, nationwide application, to the exclusion of state law. *See, e.g., United States v. Shimer*, 367 U.S. 374, 381-82 (1961).

In this case, as in *Geier*, "Congress has delegated to [the FCC] authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements." 529 U.S. at 883. If, in the exercise of that unique expertise, the agency determines that its regulation ought to be applied uniformly and exclusively nationwide, that judgment is due deference. *Id.*; *see also, e.g., City of New York*, 486 U.S. at 64 ("if the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have

sanctioned'") (quoting *Shimer*, 367 U.S. at 383). Here, although there was no evidence or argument that Congress would not "have sanctioned" the balance struck by the FCC, the Fourth Circuit nevertheless ignored the regulation because it determined that Congress had not affirmatively foreseen and prospectively "authorized" this particular application of the agency's delegated authority and expertise.

In short, in the guise of deferring to legislative judgments, the court below actually imposed a maze through which it is impossible for Congress to navigate. This is particularly true because the decision below interpreted the statute's express preemption provisions as creating a negative implication that Congress intended *not* to preempt any regulatory areas outside the four corners of those express provisions. Pet. App. 43a-44a. Thus, according to the court below, in those cases where Congress has foreseen the need for federal regulation, and expressly preempted some but not all state regulation in that area, these facts strongly "weigh[] against" finding that federal regulation preempts conflicting state law in areas where the statute is silent about preemption—no matter how stark the conflict or how obvious the need for uniform national regulation. *Id.* at 43a.

This "*expressio unius*" rule of preemption, when coupled with the affirmative "congressional statement" requirement, creates a rule necessitating that Congress affirmatively anticipate and reconcile potential federal/state-law conflicts in every context where federal regulations may reach. This result is truly "extraordinary: The statute that says *anything* about pre-emption must say *everything*; and it must do so with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 548 (1992) (Scalia, J., dissenting) (emphasis in original). Whatever the merits of such a rule in other contexts, it makes no sense to the extent it is used to cabin the preemptive scope of federal regulations that Congress has affirmatively authorized (albeit without

adding the meaningless confirmation that such uniform regulations preempt conflicting state laws).[6]

4. The Fourth Circuit compounded its analytical errors by placing a thumb on the scale against a finding of conflict preemption by invoking the "presumption against preemption." Pet. App. 34a-35a & n.4 (citing *United States v. Locke*, 529 U.S. 89 (2000)). The presumption has no logical application in a conflict preemption analysis. If application of a state's law does in fact "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines*, 312 U.S. at 67, it follows as a matter of logic that any "presumption" against preemption has necessarily been overcome. Were the rule otherwise, a state law which affirmatively conflicted with federal law could nonetheless be valid, because the conflict somehow does not overcome the "presumption." This principle cannot be squared with the constitutional supremacy of federal law: No "presumption" can sanction a state law which directly conflicts with federal law.

* * *

Taken together, the Fourth Circuit's misguided "express statement" requirement and its presumption against preemption turn the agency conflict preemption analysis on its head. As the Petition observes, in the Fourth Circuit, a federal regulation is now *presumed* to be subordinate to state tort law in the absence of an express statement of preemptive intent by Congress. Pet. 3-4. That inversion of the agency conflict preemption analysis not only threatens the efficient operation of the Nation's wireless telephone system, it also endangers the operation of countless other regulatory

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[6] Ironically, the Fourth Circuit's new "plain statement" rule will actually disserve federalism interests by forcing Congress or federal agencies to adopt broad prophylactic statements of preemptive intent in advance of evaluating actual conflicts with state law.

schemes intended to have uniform and exclusive application to a variety of vital strains of national commerce.

II. THE DECISION BELOW HAS SIGNIFICANT AND FAR-REACHING CONSEQUENCES FOR INTERSTATE COMMERCE IN NUMEROUS FEDERALLY REGULATED INDUSTRIES

The implications of the Fourth Circuit's new agency conflict preemption standard reach well beyond the telecommunications arena. Under the Fourth Circuit's decision, every company that does interstate business in an industry subject to uniform and comprehensive federal regulation now must question whether even strict compliance with the applicable federal standards nevertheless leaves the company exposed to significant tort liability for failure to satisfy some stricter "standard" imposed after-the-fact by state juries on an *ad hoc* basis.

1. Businesses operating nationwide in a multitude of industries critical to our national economy — pharmaceuticals, transportation and highway safety, railroads, aviation, banking, securities, workplace safety, advertising, agriculture, and countless others – are subject to detailed and comprehensive federal regulation. Despite the existence of governing regulatory frameworks, however, businesses operating in each industry repeatedly have been called to fend off attempts by plaintiffs, often suing on behalf of a class, to displace the applicable federal regulations with state tort law judgments that impose different and varying standards of liability. The examples are countless. *See, e.g.*, *Fifth Third Bank ex rel. Trust Officer v. CSX Corp.*, 415 F.3d 741, 745 (7th Cir. 2005) (state-law personal injury and wrongful death claims challenging the adequacy of warning signs at railroad crossing preempted by regulations promulgated pursuant to the Federal Railroad Safety Act); *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 384 (5th Cir. 2004) (state-law failure-to-warn claim alleging that airline was negligent in failing to advise passenger of risk of deep

vein thrombosis preempted by comprehensive federal regulations governing warnings provided to airline passengers); *Lynnbrook Farms v. Smithkline Beecham Corp.*, 79 F.3d 620, 624-25 (7th Cir. 1996) (state-law products liability and misrepresentation claims alleging that plaintiff's cattle were injured following inoculation with animal vaccine preempted by regulations promulgated by Animal and Plant Health Inspection Service governing safety, efficacy, potency and purity of vaccinations); *Moore v. Kimberly-Clarke Corp.*, 867 F.2d 243, 244-46 (5th Cir. 1989) (state law failure-to-warn claim alleging that tampon manufacturer failed adequately to warn of risk of toxic shock syndrome preempted FDA regulation establishing toxic shock warning requirements); *In re Bridgestone/Firestone Inc. Tires Prods. Liab. Litig.*, 153 F. Supp. 2d 935, 946-48 (S.D. Ind. 2001) (state-law class actions against manufacturers of automobile tires seeking, *inter alia*, recall of tires under state law preempted by Motor Vehicle Safety Act's delegation of authority to National Highway Traffic Safety Administration to oversee product recalls). *See also, e.g., Horn v. Thoratec Corp.*, 376 F.3d 163, 170-71 (3d Cir. 2004) (state-law products liability claims alleging defective design and manufacture of heart pump and failure to warn preempted by pre-market approval process established by Food, Drug & Cosmetic Act).

As these decisions illustrate, until now, courts almost uniformly have rejected class-action plaintiffs' invitation to undermine federal regulatory schemes governing design, testing, labeling, and other safety-related or consumer protection issues, by allowing the development of a patchwork of disparate state "standards." Both this Court and the lower federal courts have recognized that permitting a jury to apply new, more "protective" standards fashioned from state tort law threatens to upset the "delicate balance" struck by a federal agency charged with crafting regulations in furtherance of its statutory mandate. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001). *See*

also, e.g., *Geier*, 529 U.S. at 881; *Witty*, 366 F.3d at 385 ("Allowing courts and juries to decide under state law that warnings should be given in addition to those required by [an agency] would necessarily conflict with the federal regulations.").

The Fourth Circuit's conflict preemption standard likely would have led to a different outcome in nearly every case listed above, in which a plaintiff attacked the testing, labeling, manufacture, marketing, or operational safety of any of a number of products marketed or services provided nationwide and subject to federal regulation. In every case, the regulators' considered and expert judgments would likely have been set aside in favor of state-law "standards" established by lay juries, merely because the delegating statute did not itself preempt state law in all contexts.

As a consequence, the decision below threatens to change the interstate business landscape dramatically. The very existence of the Fourth Circuit's opinion necessarily calls into question business judgments made on an ongoing basis. As long as *Pinney* remains on the books, companies doing business in a federally-regulated industry within the geographic reach of the Fourth Circuit can no longer be certain that even strict compliance with detailed regulatory standards governing design, manufacture, marketing, labeling, testing, and other safety measures will be sufficient to insulate them from liability for damages under a patchwork of state tort laws.

The application of the panel majority's new preemption rule poses an even greater danger to multistate business operations. After *Pinney*, a federal regulation designed and intended to have uniform and exclusive application nationwide no longer preempts even directly conflicting state law. A regulation that reflects a federal agency's considered and expert weighing of pertinent costs, risks, and benefits can be set aside effortlessly by a lay jury applying nothing more than the extremely general guidelines supplied by state

tort law. If the regulation sets a *minimum* (or *maximum*) safety standard, prescribes a manufacturing or testing process, or dictates appropriate warnings to consumers, a jury applying state law is nevertheless free to determine that the federal safety standard is insufficiently strict, the federally mandated warnings not comprehensive enough, or the federal testing requirements less thorough than the plaintiff would prefer. *Pinney* opens the door to remarkable state-law-based second-guessing of expert agency judgments.

The result would be grave enough if a single jury in a single state were empowered to override an otherwise-applicable federal regulation. But *Pinney* invites something far worse: Any number of juries in every state are free to reconsider the balance of factors reflected in a federal regulation and to arrive at their own after-the-fact judgments. And if multiple juries in all 50 states are authorized to reach their own conclusions about safety (or marketing, or testing, or design), compliance with the law governing the design, testing, marketing, and labeling of a product or service will be all but impossible.

2. The harms that inevitably will flow from the Fourth Circuit's errors are particularly acute because the decision below devolves authority from the federal government to state *juries*, not to state lawmakers. In light of *Pinney*, multi-state businesses can take no comfort from efforts to conform even to a "crazy-quilt" of varying but readily discernible state laws and regulations. Instead, businesses will be expected to comply with a hodge-podge of post-hoc judgments of lay juries in class-action tort cases. The "rules" represented by those judgments are unknowable in advance, placing companies in the impossible position of attempting to conform their conduct to standards that exist only after the fact, as one jury after another reconsiders whether a standard established by federal regulation is sufficient under state law.

The division of regulatory responsibility between federal and state regulators makes sense in a variety of contexts, and Congress has affirmatively sanctioned, and the Courts have recognized, a dual regulatory scheme in those settings. *See, e.g., La. Pub. Serv. Comm'n*, 476 U.S. at 370-71 (dual state and federal regulation of rules governing depreciation of property used by telephone companies); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 293 (1997) (separate state and federal regulatory authority over intrastate versus interstate gas trade).[7] In this case, however, the Fourth Circuit displaced the considered judgment of federal regulators in favor of *ad hoc*, after-the-fact decisions of state juries, not state lawmakers. To the extent that the federal government considered a place in the regulation of nationwide wireless telecommunications (or any of the many other multi-state industries subject to extensive federal regulation) for the States, it surely envisioned that the state actor would be a regulatory body, not a jury. In the context of RF emissions, the intended nationwide, uniform application of the federal regulation plainly displaces state *regulation*. *A fortiori*, "regulation" of RF emissions by lay *juries* applying state tort law is even more clearly preempted. Moreover, *Pinney* invites state juries to make these sorts of *ad hoc* determinations in the context of large class actions, in which emotion, rather than reason or policy, may well influence the outcome.

The threat of massive damages awards in large state-law class actions necessarily will have a standard-setting effect. A company that markets a product or service both acceptable to federal regulators and allowable under the laws of 49 of the 50 states, but which faces an adverse judgment in a single tort case in a single state, will have little choice but to

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[7] As the Petition points out (Pet. 5-8), the history in the area of radio communications has, quite logically, been one of exclusive federal control. This makes the Fourth Circuit's devolution of authority to state litigants and lay juries all the more extraordinary.

alter its conduct to satisfy the "standard" established by the decision of that lone jury applying a single state's tort law. In effect, *Pinney* removes regulatory authority from the expert agency Congress charged to act, and places it in the hands of plaintiffs' lawyers and inexpert state jurors in a race to impose the most onerous standard. Such reallocation of authority defies the Supremacy Clause, and it is particularly ill-suited to the many industries in which the development of standards for design, manufacturing, labeling, and safe operation require the application of scientific or technical expertise.

3. In every industry for which the market for goods and services is truly national, the importance of a unified, centralized standard-setter is paramount. A uniform and exclusive federal regulatory framework provides certainty and consistency that facilitates multi-state business dealings. That consistency is essential to the development and operation of a truly national wireless telephone network, as explained in the Petition. *See* Pet. 17, 20-21, 23. It is no less crucial for the many other industries whose business operations regularly and necessarily cross state lines.

Without this Court's intervention, the Fourth Circuit's decision will cast doubt on a multitude of interstate business operations, because companies cannot know, in light of *Pinney*, whether satisfying federal regulatory requirements will be sufficient to foreclose liability under a patchwork of state laws. Because the Fourth Circuit's rationale threatens the validity of countless regulatory schemes that provide the predictability and uniformity essential to multistate business operations, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NOKIA INC., *et al.*,

Petitioners,

v.

GARRETT NAQUIN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cellular Telecommunications & Internet Association ("CTIA") represents all sectors of the wireless communications industry. Members of CTIA include wireless service providers, manufacturers, wireless data and Internet companies, and other industry participants. CTIA frequently participates in Federal Communications Commission ("FCC") proceedings and coordinates efforts to educate government agencies and the public about wireless issues.

CTIA members are subject to pervasive federal regulations that govern nearly every aspect of providing wireless equipment and service. Given the substantial resources needed to comply with these regulations, CTIA members depend on a stable regulatory environment in which federal rules are not undermined by conflicting local mandates. The need for uniformity and certainty is especially pronounced with respect to the FCC's rules regarding radio frequency ("RF") emissions. RF emissions are the basis of all wireless communication. Permitting states to set independent standards, whether by targeting emissions levels or by imposing onerous design or disclosure requirements, will impair the ability of CTIA members to serve their customers, making consumer and public safety communications less reliable and more expensive.[2]

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[1] Letters from all parties consenting to the filing of this brief are on file with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, CTIA states that no counsel for a party authored this brief in whole or in part. No person or entity, other than CTIA and its members, made any monetary contribution to the preparation or submission of this brief.

[2] CTIA is not a party to this proceeding. Its interest extends to the point that it is mentioned, but not named as a defendant, in the underlying *Naquin* complaint as part of an alleged civil conspiracy.

CTIA is one of the petitioners in *Cellco Partnership* v. *Pinney*, No. 06-207, which the Fourth Circuit also addressed in the panel opinion. The *Cellco* petition addresses a discrete issue involving application of the substantial federal question doctrine to four separate class actions distinct from the *Nokia* v. *Naquin* litigation. The *Cellco* petition asks this Court

SUMMARY OF ARGUMENT

The Fourth Circuit's decision to oust the FCC from its role as the exclusive regulator of RF emissions from mobile phones will have far-reaching ramifications. State rules affecting RF emissions cannot be drawn narrowly to avoid interference with the federal regime, because RF emissions are fundamental to interstate mobile wireless communications services. Subjecting CTIA's members to a patchwork of inconsistent state requirements will threaten the continued provision of wireless service at the quality and price expected by consumers.

The petition for certiorari thus raises issues that go to the heart of the FCC's ability to discharge its duty to "maintain control of the United States over all channels of radio transmission." 47 U.S.C. § 301. These issues are of extraordinary national importance and demand this Court's review.[1] Multiple considerations compel this conclusion. First, the Fourth Circuit undermined federal primacy over wireless regulation by applying a "presumption against preemption." In *United States* v. *Locke*, 529 U.S. 89, 108 (2000), this Court held that this presumption does not exist where there is a history of a "significant federal presence." In refusing to apply *Locke*, the panel ignored the comprehensive federal prescriptions that regulate every aspect of mobile wireless

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to vacate and remand the Fourth Circuit's jurisdictional ruling in light of the intervening decision in *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 125 S. Ct. 2363 (2005). Neither the panel's jurisdictional holding nor the class actions that were removed on federal question grounds are before this Court in the *Nokia* v. *Naquin* case that is the subject of the petition for certiorari in No. 05-198. Pet. I n.1. Because the various proceedings were consolidated below, CTIA participated as a defendant in joint briefing in the district court and court of appeals that argued that all claims in the consolidated actions were preempted by federal law.

[1] The Court should grant the petition and invite the Solicitor General to file a brief on the merits. Alternatively, CTIA endorses the suggestion of the Petitioners that the Court should request the views of the Solicitor General on this matter to help it determine whether to grant the petition. Pet. 24-25.

service. Congress and the FCC have established a framework that governs not only handset design and RF emissions, but every other aspect of providing service, from radio spectrum to the bill in the mailbox.

Second, subjecting these federal standards to state second-guessing is a recipe for chaos. The panel majority failed to consider the severe disruption state-by-state RF regulations would inflict on the wireless industry and its customers. Restrictions on the power of wireless handsets cannot be distinguished from restrictions on all the other elements of wireless networks. The design and signal strength of the wireless handset must be coordinated with every other part of the network, including base stations and switching equipment. Inconsistent local rules will create gaps in coverage and diminish the quality of both voice and data services.

Third, service disruptions caused by local RF regulations threaten public safety communications. They will harm 911 service because limiting the range of wireless phones necessarily limits their ability to reach emergency operators. Rules that lead to reduced handset power will likewise impair carrier efforts to offer enhanced 911 services that automatically transmit caller location information with 911 calls. Finally, divergent local rules governing wireless equipment design and operation will harm the ability of first responders to operate on an interstate basis.

ARGUMENT

I. THE PANEL MAJORITY FAILED TO RECOGNIZE THE COMPREHENSIVE FEDERAL PRESENCE IN THE WIRELESS INDUSTRY

The panel majority erred by mistakenly invoking a "presumption against preemption." Pet. 15; Pet. App. 34a. This Court has held that no such presumption applies "when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000). The panel concluded that "there is not the same federal presence in the wireless telecommuni-

cations area as there is in the area of maritime commerce." Pet. App. 34a-35a n.4. Not so. That glib assertion is wholly unfounded.

Federal law regulates every aspect of wireless telecommunications. At the statutory level, the Communications Act ("Act") forbids operation of radio devices, such as wireless phones, without a license, 47 U.S.C. § 301, and authorizes the FCC to promulgate regulations to prevent interference from other devices, *id.* § 302a; allocate frequencies, *id.* § 303(c); regulate the devices used, *id.* § 303(e); prevent interference generally, *id.* § 303(f); suspend licenses, *id.* § 303(m); inspect stations, *id.* § 303(n); require the illumination of radio towers, *id.* § 303(q); allocate spectrum, *id.* § 309; revoke licenses, *id.* § 312; issue construction permits, *id.* § 319; forbear from applying common carrier regulations to wireless carriers, *id.* § 332(c)(1); and allocate spectrum for public safety providers, *id.* § 337. The Act also vests the FCC with broad authority to make rules and regulations as needed to implement the Act or the FCC's responsibilities thereunder. *Id.* §§ 154(i), 201(b), 303(r).[4]

The FCC has used its delegated authority to establish a comprehensive national regulatory framework for mobile wireless services. Every stage of the process of providing mobile service—from acquiring spectrum, to phone design and certification, to building base stations, to network interconnection, to offering consumers the finished product—is closely regulated by the FCC.

Start with spectrum. FCC rules designate which frequencies are available for wireless services, 47 C.F.R. § 2.106; allocate spectrum licenses through auctions, see 47 C.F.R. Pt. 1, Subpart Q; impose build-out requirements for licensees, *see, e.g.*, *id.* § 24.203; establish licensee eligibility requirements, *see, e.g.*, *id.* § 24.12; protect licensees from in-

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[4] As the petition notes, there is no "intrastate" component to wireless services subject to state regulatory jurisdiction under 47 U.S.C. § 152(b). Pet. 27-28.

terference, *see, e.g.*, *id.* §§ 22.917(d), 24.237(a); provide for spectrum leases and transfers, *see, e.g.*, *id.* § 1.948(c); and regulate spectrum aggregation, *see, e.g.*, *id.* § 20.6.

Spectrum rights are useless without devices to exploit them. But before a manufacturer may bring a handset to market, it must first run a gauntlet of FCC rules. For example, applicants for device certification must submit test data that demonstrate compliance with all technical standards—one of which, notably, is the applicable RF exposure limit.[5] 47 C.F.R. §§ 2.1091, 2.1093; *see also id.* § 1.1307(b). For wireless devices regulated under Part 15 of the FCC rules, *id.* §§ 15.1 *et seq.*, the governing standards encompass antenna design, external RF power amplifiers and antenna modifications, restricted bands of operation, and radiated emission limits. *Id.* §§ 15.201-209. Many consumer devices operate in multiple bands, complicating the required compliance testing.

Certification requires more than test data. Applicants must submit a technical report that includes a "copy of the installation and operating instructions to be furnished the user," a "brief description of the circuit functions of the device along with a statement describing how the device operates," and a "report of measurements showing compliance with the pertinent FCC technical requirements." 47 C.F.R. § 2.1033(b)(3), (4), (6). The rules further require a number of diagrams, photographs, schematics, and exhibits. *Id.* § 2.1033(b)(5), (7), (11).

Once the carrier has spectrum rights and an approved handset, it must complete its network by building an infrastructure to communicate with the handsets. Here, too, federal rules are extensive. Just as the FCC regulates RF emissions from mobile phones, *see, e.g.*, 47 C.F.R.

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[5] The FCC has also provided an alternate route for certification through test laboratories designated as telecommunications certification bodies ("TCBs"). *See* 47 C.F.R. § 2.960. TCBs are authorized to grant official FCC equipment authorization, but the requirements are the same regardless of submission to the FCC or a TCB.